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No. 03-9046

Supreme Court, U.S.
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In The

Supreme Court of the United States

CHARLES RUSSELL RHINES,

Petitioner,

v.

DOUGLAS WEBER, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR RESPONDENT ON THE MERITS

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CAPITAL CASE

QUESTION PRESENTED

May a federal court stay, rather than dismiss, a habeas application by a state prisoner where the petition is "mixed" in that it includes both exhausted and unexhausted claims, where the state prisoner had an opportunity to present the claims in state court but failed to do so, and where the state prisoner may now pursue all of his exhausted claims in federal court?

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DECISIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 346 F.3d 799 (8th Cir. 2003) and is reprinted in the Joint Appendix. JA 145. The Order of the United States District Court for the District of South Dakota is unreported but is set out in the Joint Appendix. JA 127. It is this Order that was under appeal to the Eighth Circuit and which is now before this Court.

In addition, decisions of the state courts are set forth in the Joint Appendix. *Rhines v. Weber*, reported at 608 N.W.2d 303, 2000 S.D. 19 (JA 292). The Findings of Fact, Conclusions of Law, and Order of the Circuit Court for the Seventh Judicial Circuit in Petitioner's state habeas case are set out at JA 246. The decision of the South Dakota Supreme Court on direct appeal, *State v. Rhines*, 548 N.W.2d 415, 1996 S.D. 55, is set out at JA 149. The Judgment of Circuit Court for the Seventh Judicial Circuit, Pennington County, South Dakota, finding Petitioner guilty of first degree murder and sentencing him to death is set out at JA 16.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered October 7, 2003. JA 147. The Petitioner's Motion for Rehearing and for Rehearing En Banc was denied November 24, 2003. JA 148. The Petition for Certiorari was filed February 19, 2004. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 2244(d):

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be

counted toward any period of limitation under this subsection.

28 U.S.C. § 2254(b) and (c):

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –.

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATEMENT OF THE CASE

The question presented is whether a federal court must, under *Rose v. Lundy*, 455 U.S. 509 (1982) and *Duncan v. Walker*, 533 U.S. 167 (2001), dismiss a habeas corpus petition containing both exhausted and unexhausted issues (a "mixed petition"), unless the petitioner dismisses the unexhausted issues. Petitioner asked below that his petition be stayed, without dismissal, and the district court did so. JA 127. The Eighth Circuit reversed, holding the district court lacked that power. JA 145. Respondent Weber (hereafter "the State") asks this Court to affirm that holding.

A. Underlying Facts.

In late 1991 and early 1992, Charles Russell Rhines was an employee of the Dig 'Em Donut Shop on West Main Street in Rapid City, South Dakota. The doughnut shop terminated Rhines' employment in February 1992. JA 149. On March 8, 1992, the body of Donnivan Schaeffer, a part-time employee of the doughnut shop, was found in the doughnut shop storeroom. His hands were bound and he had been repeatedly stabbed. Approximately $3,300 was missing from the store. JA 149.

Petitioner Charles Russell Rhines was arrested in King County, Washington, for burglary in that state. JA 150. After questioning in both Seattle, Washington (JA 151-52), and Rapid City, South Dakota, Petitioner admitted, in a graphic manner, that he had burglarized the doughnut shop and killed Donnivan Schaeffer. JA 233-35. Petitioner stated that he had first stabbed Schaeffer in the stomach, causing him to collapse to the floor. JA 234. The second thrust of Petitioner's knife pierced Schaeffer's lung,

and he began to plead for his life. JA 234. Petitioner then assisted Schaeffer to the back of the doughnut shop, to a storeroom, where he administered what he referred to as the "coup de grâce" (intentionally stabbing the victim in the base of the skull). During this time, the victim seemed to anticipate his own death. JA 234. When the interrogating officers suggested that the victim might have been tied up before the last stab wound, Petitioner stated that it was too bad that the pathologist was not there to watch, and burst into laughter. JA 235. In further explaining his victim's movements, he drew an analogy to butchered chickens. JA 235. A jury convicted Petitioner of first degree murder and sentenced him to death. JA 150.

B. Direct Appeal Proceedings.

After conviction, Petitioner appealed his conviction and sentence to the South Dakota Supreme Court. That court affirmed the conviction on May 15, 1996. JA 149. Petitioner was represented by three attorneys from separate offices on his direct appeal. JA 149. Issues raised included impropriety of *Miranda* warnings prior to his confession (JA 150-61); waiver of *Miranda* rights (JA 161-63); excusing of a juror for cause in light of her views on the death penalty (JA 163-72); alleged improper use of peremptory challenges by the State (JA 172-77); the constitutionality of South Dakota's capital punishment statutes (JA 177-87); admission of certain statements relative to the criminal justice system (JA 187-92); refusal of the trial court to appoint a "forensic communication expert" to assist Rhines in case preparation (JA 193-96); refusal of three jury instructions regarding aggravating circumstances, presumption of life imprisonment, and the effect of a death sentence (JA 196-200); propriety of allowing

victim impact testimony during the sentencing phase (JA 201-06); propriety of the trial court's definition of depravity of mind (JA 206-12); propriety of submitting the killing to receive money issue to the jury (JA 213-15); propriety of submitting the torture aggravator to the jury (JA 216-20); invalidity of one aggravating circumstance and the effect of the invalidity (JA 220-23); whether Petitioner's death sentence was imposed under influence of passion, prejudice, or other arbitrary factors (JA 223-25); whether Petitioner's death sentence was lawfully imposed (JA 226-27); and whether Petitioner's death sentence was proportionate to the sentences in other death penalty cases (JA 227-35). After considering each of these issues, the South Dakota Supreme Court affirmed Petitioner's conviction and death sentence, finding, among other things, that even though there was one invalid aggravating circumstance, the existence of three other valid aggravating circumstances in a nonweighing state such as South Dakota made the fact of the invalid circumstance harmless error. JA 222-23, 235.

Following the affirmance of his conviction and death sentence, Petitioner sought certiorari from the direct appeal decision. This Court denied certiorari on December 2, 1996. *Rhines v. South Dakota*, 519 U.S. 1013 (1996).

C. State Habeas Proceedings.

Petitioner filed an application for writ of habeas corpus in the Circuit Court for the Seventh Judicial Circuit, Pennington County, South Dakota on December 5, 1996. JA 248. This application was amended for the second time on September 17, 1997, *id.*, and the habeas trial court held an evidentiary hearing on April 6, 1998. *Id.* The court

issued its findings of fact, conclusions of law, and order denying state habeas corpus relief on November 16, 1998. *See* habeas trial court's findings. JA 246. The findings are extensive, and the court denied a number of claims, including ineffective assistance of trial and appellate counsel (twenty-six separate allegations of ineffective assistance) (JA 271-85); allegations dealt with in Conclusions of Law 42 through 59, which mirrored contentions rejected on direct appeal (JA 285-89); and miscellaneous allegations of prosecutorial misconduct. JA 289-90.

Following this ruling in the habeas trial court, Petitioner appealed to the South Dakota Supreme Court, which affirmed the circuit court ruling in a decision issued February 9, 2000, *Rhines v. Weber* (JA 292). The court reiterated its ineffective assistance of counsel standards, which mirrored those of *Strickland v. Washington*, 466 U.S. 668 (1984). JA 296-98. The state court rejected each of Petitioner's allegations of ineffective assistance, including an allegation that counsel should have argued Petitioner's confession was involuntary. JA 299-300. The court found that the confession was voluntary for the reasons set out in the opinion. JA 300-301. The court also rejected a contention that it was required to engage in an extended harmless error analysis (*see Sochor v. Florida*, 504 U.S. 527, 532 (1992)) before it could find that an invalid aggravating circumstance was harmless error. JA 310-16. Other issues were found to be barred by res judicata. JA 316. The court's decision was unanimous. JA 317.

D. Federal Habeas Proceedings – District Court.

Following rejection of his state habeas corpus appeal on February 9, 2000, Petitioner sought habeas corpus in the United States District Court for the District of South Dakota, Southern Division. JA 3. The petition asserted approximately thirty-five claims, four of which Petitioner later admitted had not been asserted in the prior state court proceedings. JA 39.

The federal habeas petition was timely, as fewer than three weeks had run on the one-year limitations period set forth in 28 U.S.C. § 2244(d)(1) when the petition was filed. JA 33. Petitioner moved, pro se, that the court toll the habeas statute of limitations so he could amend his petition. In response to Petitioner's motion (filed before *Duncan v. Walker*, 533 U.S. 167 (2001)), the State did not directly argue that the statute of limitations time ran during pendency of his federal habeas petition. *Id.* The State did not admit that a second habeas case could be brought if the first were dismissed. *Id.* It was in this context that the State resisted Petitioner's pro se motion, stating that "at least for the present case" Petitioner would not lose his right to file an amended petition, further recognizing that "if the present case is dismissed Petitioner could be in danger." JA 33. The district court denied this motion. JA 35.

The district court entered an amended procedural order, requiring that the issues of exhaustion of state court remedies on the one hand and the merits of the petition on the other be resolved separately, with exhaustion being resolved first. JA 36. On July 3, 2002, the district court ruled that Petitioner had exhausted twenty-seven of his approximately thirty-five claims, but had not exhausted eight. (The State contended there were twelve unexhausted

issues; Petitioner stipulated four were unexhausted; and the court found four additional issues unexhausted. JA 128-33.)

The district court did not require dismissal of any claims, but held the entire petition in abeyance. In this respect, the district court's ruling went further than that of the Ninth Circuit in *Ford v. Hubbard*, 305 F.3d 875 (9th Cir. 2002), *amended by* 330 F.3d 1086 (9th Cir. 2003), *rev'd sub nom. Pliler v. Ford*, 124 S.Ct. 2441 (2004), which required the petitioner to dismiss his unexhausted claims in order to invoke the stay and abeyance procedure. The district court here, by contrast, did not require the purging of unexhausted claims from the petition. The petition, as amended and including all claims, remains on file with the district court. After the district court entered this order, Petitioner returned to state court and filed his second petition for state habeas corpus relief. *See* Notice of Filing (district court docket, No. 121).

E. Federal Habeas Proceedings – Court of Appeals.

The Eighth Circuit reversed and vacated the district court's order of "stay and abeyance," holding that habeas claims may not be stayed while Petitioner seeks state court remedies on claims that are unexhausted. JA 145. The Eighth Circuit held that while the petition could not be stayed, Petitioner had a likely right to delete unexhausted claims while proceeding only on the claims that he believes are fully exhausted, or he could contest any contention that claims were unexhausted and proceed with his federal habeas petition. JA 146. The Eighth Circuit remanded the case to the district court to consider

either (1) the deletion of unexhausted claims or (2) Petitioner's contentions regarding nonexhaustion. *Id.*

The State agrees with the remand, and does not argue that the entire case must be dismissed, *unless* Petitioner refuses to dismiss unexhausted claims. The Eighth Circuit denied rehearing and rehearing en banc November 24, 2003. JA 148. Petitioner filed a timely Petition for Writ of Certiorari February 19, 2004. This Court granted certiorari June 28, 2004.

SUMMARY OF ARGUMENT

This Court has long required dismissal of federal habeas petitions containing both exhausted and unexhausted claims, as a part of "[a] rigorously enforced total exhaustion rule. . . ." *Rose v. Lundy*, 455 U.S. 509, 518 (1982). This rule "encourage[s] state prisoners to seek full relief first from the state courts. . . ." *id.*, and provides a "simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." *Id.* at 520. This instruction has multiple purposes: It prevents the "unseemly" result of "a federal district court . . . upset[ing] a state court conviction without an opportunity to the state courts to correct a constitutional violation," *id.* at 518 (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)); it encourages state prisoners to seek full relief from state courts, *id.*; it increases the potential hospitability of the state courts to federal constitutional issues, *id.* at 519; it relieves the federal courts from the task of distinguishing between exhausted and unexhausted claims, *id.* at 519; it makes the process simpler by requiring that all claims be

exhausted before any claim is brought to federal court; and it reduces piecemeal litigation by making it more likely that all the prisoner's claims will be considered in a single proceeding. *Id.* at 520. Where, as here, there are admittedly unexhausted claims, dismissal, or voluntary withdrawal of unexhausted claims, simplifies both state and federal proceedings. *Rose* adopted this requirement even though nearly all courts of appeals held the opposite. Congress did not abrogate *Rose* when it passed AEDPA, but retained the exhaustion requirement. 28 U.S.C. § 2254(b).

Congress adopted a policy under AEDPA to streamline and speed up the federal habeas process. At best, a stay and abeyance procedure promotes or creates additional delay. While Petitioner claims that most habeas petitioners have no incentive to delay, he admits that this is not true for him as a death-sentenced inmate. Petitioner's Brief at 27. And in fact nondeath-sentenced habeas petitioners sometimes have incentives to create delay as well. Delay can prejudice the state in responding to a habeas petition litigated years after the fact. In the past, the doctrine of abuse of the writ has been available to ameliorate certain time-based prejudice. *See* Rule 9, Rules Governing Habeas Corpus Cases Under Section 2254 (hereinafter Federal Habeas Rules). With the passage of the habeas statute of limitations, however, this Court will revise Rule 9 to eliminate the abuse of the writ provisions (effective December 1, 2004). Thus, only the statute of limitations will be available to defend against delay-induced prejudice. Petitioner and his allies apparently desire to neutralize the statute to the point that delay is inevitable.

Petitioner's arguments, moreover, are a back-door attack on several of this Court's decisions. One of those is

Duncan v. Walker, 533 U.S. 167 (2001), which specifically held that the limitation period is not tolled by filing a petition in federal court. "Stay and abeyance" is a procedure manufactured by lower federal courts to neutralize *Duncan's* holding and to in effect toll the statute during the precise period where Congress and this Court provided that it would not be tolled. Thus, even though Congress provided no tolling during this period, as *Duncan* found, stay and abeyance would toll the statute during this same period.

Petitioner is not presently in danger of having his case dismissed. The Eighth Circuit remanded the case to the district court to consider whether the case ought to be dismissed, but also to determine whether Petitioner should be allowed to delete unexhausted claims from his petition, forego further state proceedings (or indeed to pursue such proceedings separately), or possibly "proceed on all claims in the federal habeas action and contest any argument by Respondent that the unexhausted claims are procedurally barred." *Rhines v. Weber* (JA 146). Respondent does not contest this remand. Petitioner is thus in no danger of losing all federal remedies, although he may well be in danger of losing some issues that have not been previously exhausted. This result, however, is brought about by this Court's requirement that issues be raised first in state court before Petitioner comes to federal court. *Rose*, 455 U.S. at 518. A stay and abeyance procedure does away with *Rose's* requirement and makes the statute of limitations largely ineffective. Petitioner's arguments are thus a back-door attack on AEDPA and its purpose of reducing delay in the federal habeas process.

ARGUMENT

I. INTRODUCTION.

This case raises important issues of federalism and the relationship of the states with the lower federal courts. In *Rose v. Lundy*, this Court stated that "[a] rigorously enforced total exhaustion requirement will encourage state prisoners to seek full relief first from the state courts," 455 U.S. at 518. This requirement is a continuing part of federal habeas jurisprudence. The Court instituted this requirement in spite of the fact that the vast majority of circuit courts of appeals (eight of ten) had allowed district courts to proceed to the merits of exhausted federal habeas issues when a petition contained both exhausted and unexhausted claims. *Rose*, 455 U.S. at 513. n.5. The Court plurality held that the petitioner had a choice: Allow the mixed petition to be dismissed, or seek adjudication on the merits of those issues that had been exhausted in the state courts. *Rose*, 455 U.S. at 520-21.

This foundation of a total exhaustion requirement has remained as a bedrock principle of federal habeas corpus law, and this Court has repeatedly recognized the correctness of this principle. *Pliler v. Ford*, 124 S.Ct. 2441, 2444 (2004); *Duncan*, 533 U.S. at 179; *Slack v. McDaniel*, 529 U.S. 473, 478-79 (2000); *O'Sullivan v. Boerckel*, 526 U.S. 838, 843-44 (1999); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Castille v. Peoples*, 489 U.S. 346, 349 (1989). Stay and abeyance was not available under *Rose*. Congress was also aware of the exhaustion requirement when it passed the Antiterrorism and Effective Death Penalty Act. The Act adopted a statute of limitations for federal habeas corpus and retained the statutory exhaustion requirement explained in *Rose*. 28 U.S.C. § 2254(b), (c); *see* 141 Cong. Rec. S7803-01 at S7847 (daily ed. June 7, 1995) (statement

of Senator Specter: "[T]his bill does not abolish the exhaustion requirement.").

The existence of *Rose*, together with the statute of limitations, 28 U.S.C. § 2244(b), has the potential to streamline habeas proceedings as Congress intended. Petitioner, and the lower courts that support his request for "stay and abeyance," would cripple both *Rose* and AEDPA by granting Petitioner tolling where Congress and this Court have said there is none. *Duncan*, 533 U.S. at 177-78. This Court should ensure that the congressional purpose and the purposes of *Rose* are accomplished by refusing to allow a tactic, the purpose and effect of which would be delay beyond those delays available before Congress acted, and to grant tolling of the statute where Congress granted none. *Duncan*, 533 U.S. at 177-78. Petitioner seeks not only to eviscerate the statute of limitations, but also to undermine the total exhaustion rule of *Rose*. The statute of limitations enacted by AEDPA ought to provide an occasion to enforce, rather than eliminate or undermine, *Rose*.

The natural consequence of this statute of limitations is that some petitioners will not be able to present claims where they might have been able to do so before. When combined with *Rose*, 455 U.S. at 520: "before you bring any claims to federal court, be sure that you first have taken each one to state court," the statute of limitations can lead to loss of certain claims that have not been taken to state court before a petitioner files in federal court. This is not improper, unfair, or contrary to congressional intent because it does not deprive Petitioner of relief, except as to those individual claims that "[he] first [has not] taken . . . to state court." *Id.*

II. A "STAY AND ABEYANCE" PROCEDURE IS INCOMPATIBLE WITH THE EXHAUSTION RULE UNDER *ROSE V. LUNDY*, 455 U.S. 509 (1982) AND THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT (AEDPA).

A. "Stay and Abeyance" Is Contrary to *Rose v. Lundy*.

The issue in this case is whether district courts are permitted to use a procedure referred to as "stay and abeyance," when dealing with federal habeas petitions by persons in custody pursuant to the judgments of state courts. "Stay and abeyance" allows a habeas petitioner to stay procedures in federal court, hold the federal action "in abeyance," and the federal action is not dismissed. Such a procedure is contrary to specific directions from this Court in *Rose*, 455 U.S. at 520: "our interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." Further, this Court has stated in *Rose*, that "a rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error." *Id.* at 518-19. This Court has recently recognized the vitality of *Rose*, affirming the principle that "the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a federal habeas petition." *O'Sullivan*, 526 U.S. at 842 (exhaustion must include a request for any discretionary review available in the state's highest court). *See also Duncan*, 533 U.S. at 179 (citing *Rose's* reference to the "rigorously enforced total exhaustion rule") and noting that "diminution of statutory

incentives to proceed first in state court would also increase the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce," *id.* at 180; *Pliler*, 124 S.Ct. at 2444 ("under *Rose*, federal district courts must dismiss 'mixed' habeas corpus petitions").

A "stay and abeyance" procedure does away with the rigorously enforced exhaustion requirement. Under stay and abeyance, there is no real exhaustion requirement at all. As applied by the courts of appeals,[1] "stay and

[1] *Crews v. Horn*, 360 F.3d 146 (3d Cir. 2004) (stay is appropriate where dismissal could jeopardize timeliness of collateral attack – court *should not* dismiss even the unexhausted claims); *Griffin v. Rogers*, 308 F.3d 647 (6th Cir. 2002) (court applied equitable tolling where case had first been dismissed, but stated a preference for staying petition); *Ford v. Hubbard*, 305 F.3d 875 (9th Cir. 2002), *amended by* 330 F.3d 1086 (2003), *rev'd sub nom. Pliler v. Ford*, 124 S.Ct. 2441 (2004) (dismissal was "prejudicial error"; amendment procedures and relation back apply; unexhausted claims must be dismissed but can be reasserted after exhaustion); *Nowaczyk v. Warden*, 299 F.3d 69 (1st Cir. 2002) (petition was *not* mixed, but presented only exhausted claims, another state petition was pending presenting issues *not* raised in the federal petition. *Held*: District court *could* stay such a petition; dicta favors mixed petition stay and abeyance); *Newell v. Hanks*, 283 F.3d 827 (7th Cir. 2002) (approves stay and abeyance, although district court actually dismissed petition and later vacated the dismissal); *Palmer v. Carlton*, 276 F.3d 777 (6th Cir. 2002) (adopts stay and abeyance, but finds petitioner waited too long after exhaustion to reinstate dismissed unexhausted claims); *Delaney v. Matesanz*, 264 F.3d 7 (1st Cir. 2001) (dicta favors stay and abeyance); *Neverson v. Bisonnette*, 261 F.3d 120 (1st Cir. 2001) (stay and abeyance considered in dicta; case remanded to consider equitable tolling); *Zarvela v. Artuz*, 254 F.3d 374 (2d Cir. 2001) (allows a stay and abeyance; generally requires refiling in both state and federal court to be taken within thirty days); *Anthony v. Cambra*, 236 F.3d 568 (9th Cir. 2000) (stay and abeyance required; unexhausted claims dismissed; refiling of unexhausted claims following exhaustion relates back to original filing); *Freeman v. Page*, 208 F.3d 572 (7th Cir. 2000) (dicta suggests filing in both courts and stay of federal action; petition *held* untimely); *Tinker v. Hanks*, 172 F.3d 990 (7th Cir. 1999) (same); *Brewer v. Johnson*, 139 F.3d 491 (5th Cir. 1998) (district court

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abeyance" allows a district court to either dismiss the unexhausted claims, as in the Ninth Circuit, or retain all claims, as in the Third and Seventh Circuits; enter a stay for (usually) an indefinite period; require a return to state court; and then require a return to federal court. The procedure, contrary to *Rose*, does not call for dismissal of the petition, nor for dismissal of unexhausted issues and proceeding with the exhausted claims. The lower courts that have used the stay and abeyance procedure, therefore, have failed to carry out the clear mandate of this Court set out in *Rose*, *Castille*, *Coleman*, *O'Sullivan*, *Slack*, *Duncan*, and *Pliler*.

While Respondent agrees with Petitioner that the Eighth Circuit is alone in its (correct) view of "stay and abeyance," (Petitioner's Brief at 13-16) this has not deterred the Court from coming to the correct, contrary resolution on an issue in the past. *Rose*, 455 U.S. at 513 n.5 (noting that eight circuits did not enforce a total exhaustion requirement, while only two did so). This Court should have even less hesitancy in rejecting the rulings of the courts of appeals where they fail to follow the clear dictates of *Rose* when considered together with the statute of limitations.

The rationale for the total exhaustion requirement, as set out in these cases, is no less compelling now than it

has discretion to dismiss petition; dismissal upheld; petitioner had not established that he could not refile in federal court); *Calderon v. United States District Court*, 134 F.3d 981 (9th Cir. 1998) (stay and abeyance permitted *only* where district court first dismisses any unexhausted claims); *Mackall v. Angelone*, 131 F.3d 442 (4th Cir. 1997) (pre-AEDPA case), *contra*, *Rhines v. Weber*, 346 F.2d 799 (8th Cir. 2003), *cert. granted*, 124 S.Ct. 2905 (2004) (case at bar); *Akins v. Kenney*, 341 F.2d 681 (8th Cir. 2003) (stay and abeyance not allowed).

was when the cases were decided. The Court in *Rose* stated the purpose as follows:

> The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. *See Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490-491 (1973). Under our federal system, the federal and state "courts [are] equally bound to guard and protect rights secured by the Constitution." *Ex parte Royall*, 117 U.S. [241], at 251 [(1886)]. Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass on the matter." *Darr v. Burford*, 339 U.S. 200, 204 (1950).

455 U.S. at 518. The Court stated further that "a rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error." *Id.* at 518-19. Finally, "to the extent that the exhaustion requirement reduces piecemeal litigation, both courts and the prisoner should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding." *Id.* at 520.

All of these goals are impeded if the district court could stay action on a petition rather than dismissing the petition or giving the petitioner a choice whether to proceed with the exhausted claims only. There is no encouragement to seek relief first from state courts, as petitioner may file a federal habeas petition (and have it retained and stayed) when there is a single exhausted issue. The procedure causes additional delay. Petitions can remain in federal court for years without further action. Under "stay and abeyance," the Court's "simple and clear instruction" (*Rose* at 520) "before you bring any claims in federal court, make sure that you have first taken each one to state court," ceases to govern federal habeas cases.

The cases Petitioner cites do not require a "stay and abeyance" procedure in federal court: *Slack*, 529 U.S. at 487, holds that a second petition (filed within the statute of limitations) is not barred as "second or subsequent" when there has been a failure to exhaust. It does not hold, as Petitioner argues, that "the exhaustion requirement controls *when* federal claims will be heard in § 2254 cases, not *whether* they will be heard." Petitioner's Brief at 11.

Petitioner places much stock in non-habeas, unrelated civil cases. Petitioner's Brief at 10-13. Citation of such cases is of limited utility in this habeas corpus case. Exhaustion of claims in some other court is not a problem common to most other civil cases.[2] Habeas corpus is

[2] In *Wilton v. Seven Falls Company*, 515 U.S. 277 (1995), eventual dismissal of the federal action was contemplated upon resolution of claims in state courts. Unlike habeas proceedings, the federal court would have had no power to reconsider the state court ruling, which would have been res judicata in the federal court. The Court made it clear that the discretionary stay was based on the language of the Declaratory Judgment Act. *Id.* at 285-87. The case was retained only to

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different; it has its own procedures and usages. *See Felker v. Turpin*, 518 U.S. 651, 663-64 (1996) (outlining separate history of habeas corpus holding that AEDPA provisions are not a "suspension of the writ" under U.S. Const. art. I, § 9, cl. 2). Habeas Rules, Rule 11 (Rules of Civil Procedure applicable only if not inconsistent with "these rules" or "any statutory provisions" [amendment effective December 1, 2004]).

Contrary to Petitioner's argument, moreover, the federal courts' "virtually unflagging obligation to exercise the jurisdiction given to them" under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-18 (1976) is not relevant to the habeas exhaustion requirement or the habeas statute of limitations, except that it might require a district court to proceed to the merits on those claims that are exhausted. If the statute of limitations bars consideration of a case or claims (when considered with *Rose* and its progeny), then the merits of those claims are no longer matters over which the federal court must exercise jurisdiction. Moreover, none of the cases cited in Petitioner's Brief at last full paragraph of 11 and all of 12 are habeas cases. They thus are not in the unique field where there is a "rigorously enforced total exhaustion rule," *Rose*, 455 U.S. at 518, together with a statute of limitations specifically designed to "provide[] a powerful

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ensure that the case would be resolved if "the state case, for any reason, fail[ed] to resolve the matter in controversy." *Wilton*, 515 U.S. at 288 n.2. In *Deakins v. Monaghan*, 484 U.S. 193 (1988), the Court dealt with a *Younger v. Harris*, 401 U.S. 37 (1971) abstention issue where state criminal proceedings were pending, but there was no opportunity in state court to pursue a damages claim. There was no habeas exhaustion requirement and no prior case law requiring dismissal or deletion of claims.

incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts." *Duncan*, 533 U.S. at 180.

B. Congress, When it Enacted AEDPA, Retained the *Rose v. Lundy* Total Exhaustion Rule.

The requirements of *Rose* (*viz.*, the dismissal or elimination of unexhausted claims) are an important part of the foundation of AEDPA. In passing AEDPA, Congress did not weaken the statutory exhaustion requirement as it existed prior to AEDPA. The exhaustion requirement has existed since 1886, *Ex parte Royall*, 117 U.S. 241, 251 (1886), and was first codified in 1948, 28 U.S.C. § 2254 (1946 ed., Supp. III). *Rose* was decided in 1981 and consistently applied in subsequent cases. It must therefore be assumed that Congress was aware of the requirements of *Rose* and its progeny. *See Williams v. Taylor*, 529 U.S. 420, 434 (2000) ("When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in absence of specific direction to the contrary.").

The statements of sponsors of the legislation confirm Congress's intent to retain the exhaustion requirement, a requirement that included the interpretation in *Rose*. Senator Specter, one of the prime sponsors of what eventually became AEDPA, stated that "this bill does not abolish [the] exhaustion requirement. Unli[k]e the resolution of this issue in the 1990 legislation, which passed the senate, which eliminated the requirement of exhaustion of state remedies that provision is not in this bill." 141 Cong. Rec. S7803-01 at S7847 (daily ed. June 7, 1995). The

design and language of AEDPA, *Duncan*, 533 U.S. at 180, are thus consistent with retention of the *Rose* total exhaustion requirement. Accordingly, all of the reasons set forth in § II(A), *supra*, as to why the stay and abeyance procedure undermines the *Rose v. Lundy* total exhaustion rule and its objectives, retain their vitality post-AEDPA.

C. "Stay and Abeyance" Is Contrary to the Congressional Purpose Underlying the Statute of Limitations, as Construed in *Duncan v. Walker*.

One of the principal innovations of AEDPA was its imposition of a one-year statute of limitations on the filing of federal habeas corpus petitions. The stay and abeyance procedure is inconsistent with the limitations period in three interrelated respects. First, it undermines the policy underlying the limitations period, which is to expedite the habeas process. The stay and abeyance procedure slows the habeas process down considerably. Second, it is inconsistent with the provision tolling the limitations period during the pendency of a "properly filed application for State post-conviction or other collateral review." 28 U.S.C. § 2244(d)(2). The stay and abeyance procedure removes the incentive for habeas petitioners to exhaust all of their state claims before filing their federal petitions. Finally, stay and abeyance is inconsistent with this Court's holding in *Duncan v. Walker* that the tolling provision does not toll the limitations period while a mixed petition is pending in federal court. The stay and abeyance procedure was created expressly to undermine that result and provide for tolling during the period a mixed petition was pending in federal court.

1. The policy of AEDPA is plainly to expedite the habeas process. As this Court stated in *Woodford v. Garceau*, 538 U.S. 202, 206 (2003), "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases. . . ." *See also Duncan*, 533 U.S. at 179 (AEDPA has the purpose of "reduc[ing] the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review"); H.R. Conf. Rep. No. 104-518 at 111, 104th Cong., 2d Sess. (1996), *reprinted in* 1996 U.S.C.C.A.N. 944; (Title 1 of AEDPA "incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases").

The principal mechanism through which Congress addressed the concerns of delay was its enactment of the one-year statute of limitations, 28 U.S.C. § 2244(d)(1). All statutes of limitations limit the *time* within which a case may be brought and thereby limit the presentation of stale claims. This particular statute does so for the purpose of "reduc[ing] the potential for delay on the road to finality by restricting the time that a potential federal habeas petitioner has in which to seek federal habeas review." *Duncan*, 533 U.S. at 179. In this case, a capital case, Petitioner admits that he has an incentive to delay a final resolution. Petitioner's Brief at 27. There are other situations where a petitioner's claim improves with age, as witnesses or lawyers may die, records may be destroyed, or evidence may disappear.

The statute's goal of expediting the federal habeas process would be easily circumvented if the stay and abeyance procedure were upheld. That procedure permits

the presentation of a petition with one or a few exhausted claims, even if there are many unexhausted claims, and then the return to state court for a second (or third) round of attempted exhaustion. All the while, the federal habeas case might remain on the federal court's docket for years. That is not expediting the process as Congress intended. By contrast, if the total exhaustion rule of *Rose v. Lundy* continues to apply (rather than stay and abeyance), the habeas petitioner would be able to present a petition only within the one-year period after completing state direct appeal as appropriately stayed during any state post-conviction or other collateral proceedings. *Duncan*, 533 U.S. at 177-78. This is precisely what Congress sought to attain, and is consistent with this Court's *Rose* jurisprudence.

Petitioner is thus mistaken when he argues that "the exhaustion requirement controls *when* federal claims will be heard in § 2254 cases, not *whether* they will be heard." Petitioner's Brief at 11 (emphasis in original). While this may have been true prior to the statute of limitations, the statute, in conjunction with exhaustion doctrine, can and does limit Petitioner's ability to bring claims that have not been exhausted after an opportunity to do so. This is the natural and logical effect of retaining the total exhaustion requirement (not altered by 28 U.S.C. § 2254) while adopting a statute of limitations that does *not* provide for tolling of the statute during federal habeas proceedings. *Duncan*, 533 U.S. at 177-78.

The importance of preventing the limitations period from being subverted is heightened by changes to the Rules Governing § 2254 Cases. The limitations period is apparently a *replacement* for the doctrine of abuse of the writ embodied in Habeas Rules, Rule 9 (prior to December

1, 2004). Under the present Rule 9 (through November 30, 2004), delayed petitions may be dismissed if the state was prejudiced in its ability to respond to the petition by delay in its filing (Rule 9 prior to December 1, 2004).[3] The post-December 1, 2004 Rule 9 only refers to the successive petition rule of 28 U.S.C. § 2244(b)(3) and (4). The State and the courts are thus without tools to address the situation of a prejudicial delay, except the AEDPA statute of limitations. If Petitioner's interpretation of *Rose* and 28 U.S.C. § 2244(d) is adopted, stay and abeyance allows for any length stay the district court will grant. There is no statutory rule, or other limit to take account of situations where a lawyer or witness has died, evidence or records have been lost because of passage of time, or where a petitioner has intentionally delayed in order to enhance his claims or postpone his day of reckoning. If "stay and abeyance" is allowed, the statute does not effectively limit the time required for habeas adjudication. With repeal of Rule 9, however, it *must* do so if there is to be any limit on abusive filings.

2. In addition to retaining the total exhaustion requirement of *Rose v. Lundy*, AEDPA encourages filing

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[3] The State realizes that the present Rule 9 remains in effect as of the date of this brief. Unless its effectiveness is delayed by Congress, however, it will cease to be the law as of December 1, 2004, before this case is argued or decided. *See* 28 U.S.C. §§ 2072, 2074, 2075. The court's Order of April 26, 2004, provides, in part, as follows:

> [T]he foregoing amendments to the ... Rules Governing Section 2254 Cases in the United States District Courts ... shall take effect on December 1, 2004, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

Order of April 26, 2004, authorizing transmission of rules to Congress.

fully exhausted federal habeas petitions by tolling the limitations period during the pendency of state proceedings. 28 U.S.C. § 2244(d)(2) (tolling the limitations period during the pendency of a "properly filed application for State post-conviction or other collateral review"). This Court stated in *Duncan* that

> Section 2244(d)(1)'s limitation period and § 2244(d)(2)'s tolling provision, together with § 2254(b)'s exhaustion requirement, encourage litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions as soon as possible. [533 U.S. at 181]

The stay and abeyance procedure is out of step with this "design" and would result in "diminution of statutory incentives to proceed first in state court" at "the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce." *Id.* at 180. As discussed in § II(A), *supra*, the stay and abeyance procedure removes the principal consequences that *Rose* – and AEDPA – sought to impose on habeas petitioners who fail to exhaust all state remedies before proceeding to federal court.

3. Finally, a stay and abeyance procedure specifically undermines the holding of *Duncan*, which construed the limitation period's tolling provision. *Duncan* specifically held that the time within which a habeas petition may be brought is not tolled by the filing of a federal habeas petition. *Id.* at 180-81. The Court found that Congress, by the language of the statute it adopted, intended that the time of the limitation period was not tolled during a filing in federal court. A stay and abeyance procedure nullifies the construction of § 2244(d)(2) adopted in *Duncan* by tolling the statute (that is not allowing it to run) because there has been a filing in *federal* court. Petitioner would, if

stay and abeyance applies, have accomplished directly what *Duncan* prohibits: He would have stopped the running of the statute against him by filing in *federal* court.

Whatever the intent or motivation of Petitioner, or the good faith of Petitioner or the courts, stay and abeyance, in reality, leads to delay beyond that envisioned by Congress. Stay and abeyance is incompatible with and destructive of this Court's ruling in *Rose* and of the AEDPA limitation period. Open-ended stays to allow exhaustion serve no purpose other than neutralizing the statute. They also neutralize *Duncan* by allowing a federal filing to "stay" (or toll) the statute. If Congress had intended an unlimited time within which to exhaust state remedies, it would not have adopted a statute of limitations. In practical effect, there is nothing except *Rose's* complete exhaustion requirement that will encourage the filing of fully exhausted petitions, encourage early exhaustion, discourage delay tactics, and enforce the one-year statute of limitations. The only purpose of a stay and abeyance procedure is to thwart these goals, the congressional intent, and this Court's holdings in *Rose* and *Duncan*.

III. APPROPRIATE FEDERAL REVIEW REMAINS AVAILABLE WITHOUT "STAY AND ABEYANCE."

A. Federal Review Remains Available to Habeas Petitioners Under a Complete Exhaustion Requirement.

The State's interpretation of *Rose* and 28 U.S.C. § 2244(d) does not deprive Petitioner of federal habeas review. Rather, Petitioner potentially loses only those issues that he has failed to exhaust in the state courts.

Petitioner in this action had a total of thirty-five claims. Of those, the district court found eight unexhausted, leaving Petitioner with twenty-seven claims he may assert under the State's argument. Petitioner's Brief at 27. Those issues that are already exhausted remain for decision by the federal habeas court, even where *Rose* and AEDPA are fully implemented. *Rose*, 455 U.S. at 520-21.

This Court's statement of the purpose of the exhaustion requirement (*Rose*, 455 U.S. at 520) remains relevant.

> [S]trict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition. . . . for as a result the district court will be more likely to review all of the petitioner's claims in a single proceeding, thus providing for a more focused and thorough review.

Petitioner turns this requirement on its head by advocating a rule that allows filing a mixed petition with a single exhausted claim rather than a single, fully exhausted petition. Petitioner's proposed rule, including "stay and abeyance," permits and encourages premature filing of mixed petitions before any serious attempt is made at exhausting *all* state remedies.

Habeas petitioners need not fear the statute of limitations where they continue to pursue state remedies within a reasonable time. As *Duncan* makes plain, any time during which there is a pending post-conviction petition before the state courts is excluded from the statute. There is no reason why any habeas petitioner should fail or refuse to pursue state court remedies (or, for that matter, why the petitioner should stop any attempts to exhaust).

The statute of limitations and *Duncan* make exhaustion of state remedies at the earliest possible date, and continuing pursuit of state remedies, imperative. If a petitioner delays asking for habeas relief on an issue in state court, but later requests that relief, he might run afoul of the statute of limitations under *Duncan*. Under the plurality of *Rose*, however, such a petitioner still is permitted to assert any claims in federal court that have been exhausted in state court. 455 U.S. at 520-21.

Rose, *Duncan*, and 28 U.S.C. § 2244(d) do not deprive petitioners of federal habeas review. Dismissal is not the only course of action in the district court under the Eighth Circuit holding. Rather, the Eighth Circuit remanded to the district court for the purpose of considering whether Petitioner would "elect[] to forego further state court proceedings, in which case he would presumably proceed on all claims in the federal habeas action and contest any argument by Respondent that the unexhausted claims are procedurally barred." *Rhines* (JA 146). The court stated further,

> *Akins* [versus *Kenney*, 341 F.3d 681 (8th Cir. 2003)] precludes the district court from staying Rhine's exhausted claims while he seeks state post-conviction relief on other claims that may be unexhausted. However, *Akins* did not decide whether a petitioner may delete unexhausted claims while proceeding only on the claims he believes are fully exhausted.

Id.

Respondent agrees with the Eighth Circuit remand. It is consistent with the plurality statement in *Rose*, 455 U.S. at 520: "A total exhaustion rule will not impair that

interest [in obtaining speedy relief] since he [petitioner] can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims." The *Rose* Court stated that doing so might not be to petitioner's advantage, since upon returning to federal court, the district court may find that assertion of the newly exhausted claims may constitute an abuse of the writ.[4] *Id.* at 521 (citing *Sanders v. United States*, 373 U.S. 1 (1963)).

Where a stay and abeyance procedure is not allowed, and the Eighth Circuit position governs, Petitioner will be able to assert those issues he has exhausted when he brings his federal petition. A petitioner will further be able to assert any other issues that are exhausted before running of the federal statute of limitations, recognizing that the statute does not run while petitioner continues to pursue state court remedies. *Duncan*. Of course, Petitioner could potentially lose those issues that are not exhausted until after the running of 28 U.S.C. § 2244(d), if there is a time period when petitioner had a federal habeas action pending but no state action pending. That is the case here. Petitioner's Brief at 4, 23. Approximately two and one-half years ran while the federal petition was pending, and no state petition was on file. *Rhines v. Weber* (JA 292), decided February 9, 2000; second state habeas filed August 5, 2002 (Notice of Filing, district court docket No. 21). As Petitioner further points out, however (Petitioner's Brief at 27), Petitioner made approximately thirty-five individual claims. Petitioner alleged four of these were unexhausted, Respondent asserted that twelve were

[4] Under the repeal of Habeas Rule 9, the statute of limitations apparently substitutes for abuse of the writ doctrine.

unexhausted, and the district court found a total of eight unexhausted. JA 128-33. Petitioner is not, therefore, deprived of all federal review. Only those issues that were not brought to the attention of the state courts in spite of opportunities to do so are potentially lost.[5]

B. Loss of Claims Where They Have Not Been Expeditiously Pursued in State Courts Is the Normal Result of the Statute of Limitations.

Petitioner's argument that stay and abeyance must be instituted so that he will have a practically unlimited opportunity to bring new claims runs afoul of the statute of limitations. Petitioner, of course, complains that "a dismissal deprives prisoners of the right to have a federal court consider a timely filed § 2254 petition on its merits if the petitioner had the misfortune of having his one-year AEDPA limitations period elapse before the district court determined the petition to be mixed." Petitioner's Brief at 20. There are several answers to this contention. First, there is no reason under AEDPA why Petitioner should not pursue any arguable state remedies prior to filing in

[5] Petitioner's contentions to the contrary notwithstanding (Petitioner's Brief at 30-31), the State does not believe that a habeas petitioner is entitled to present all claims he may have, no matter when he first asserts them in state court. *Slack* does not so hold but holds only that a second petition may be brought where the first was dismissed for failure to exhaust, and the new petition is not outside the statute of limitations. Habeas is subject to all the provisions of AEDPA, which are not a suspension of the writ, *Felker*, 518 U.S. 651, 664 (1996). The quote from *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (Petitioner's Brief at 31) also does not govern as Respondent is not asking for outright dismissal and the Eighth Circuit did not require such dismissal.

federal court, or even while a federal petition is pending. Petitioner in the case at bar admitted that his petition was mixed when he had approximately three months left to file a second state petition. JA 44, 55, 58, 60 (Amended Petition filed November 20, 2000; statute expired at earliest in February 2001). This is exactly what *Rose* contemplates. If such remedies are being pursued, then the statute of limitations is automatically tolled. 28 U.S.C. § 2244(d)(2); *Duncan*.

Second, Petitioner does not even potentially lose his right to have exhausted issues determined by the federal court, so long as the petition containing them is filed prior to the one-year period of limitations expiring. The mixed petition may thus be considered on its merits, although perhaps with fewer issues. Third, as long as state remedies are being pursued, there is no need to have a federal court case pending, *unless* the statute has already expired. If the statute has already expired, then the district court, in dismissing or requiring the deletion of unexhausted claims, is following 28 U.S.C. § 2244(d), *Rose* and *Duncan*. This is natural and necessary if the statute is to serve the purpose of promoting "the well-recognized interest in the finality of state court judgments." *Duncan*, 533 U.S. at 179.[6]

[6] Petitioner argues that if the stay and abeyance procedure is not approved, then this Court should equitably toll the statute of limitations for this Petitioner. Petitioner's Brief at 23 n.5. Equitable tolling is inappropriate under this statute. This Court has determined that where a statute of limitations contains its own tolling provisions, equitable tolling is not available. *United States v. Beggerly*, 524 U.S. 48-49 (1998). AEDPA contains a provision that postpones the running of the one-year limitation for the filing of a petition for habeas corpus to "the date on which the factual predicate of the claim or claims presented could have been discovered through exercise of due diligence." Congress has also provided two other situations in which the period may be enlarged

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Petitioner also contends that the exhaustion requirement is so difficult to understand that no petitioner, lawyer, or judge can accurately predict or determine exhaustion. This contention is backed by citation to statistics from dissenting opinions in *Pliler* and *Duncan*. Petitioner's Brief at 25-26. Such a contention was firmly rejected in *Rose*, 455 U.S. at 520:

> There is no basis to believe that today's holdings will "complicate and delay" the resolution of habeas petitions (STEVENS, J. *post*. at 550), or will serve to "trap the unwary pro se prisoner." (BLACKMUN, J., *post*. at 530). On the contrary, our interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you have first taken each one to state court.

This Court has held that all a petitioner needs to do is "fairly present" the same claim to the state courts as he presents in federal court. *Picard v. Connor*, 404 U.S. 270, 275 (1971). This includes presenting to state courts both the facts and law presented to the federal court. *Id.* at 277-78. While Petitioner needs to raise the same claim, or present "the substance of a federal habeas corpus claim" (*id.* at 278), to the state court, he does not need to "cit[e] book and verse on the federal constitution" (*id.* at 278). This is not an impossibly difficult task in any case, as *Rose*

based on the equities of the situation. 28 U.S.C. § 2244(d)(1)(B), (C), (2). Finally, Petitioner is not one who "belatedly" realized his petition was unexhausted, *Duncan*, 533 U.S. at 184 (Stevens, J., concurring). He knew of failure to exhaust approximately three months before the statute ran. JA 60, 292. The State never assured him that he could file unexhausted claims *ad infinitum*. He was not "affirmatively misled." *Pliler*, 124 S.Ct. at 2448 (O'Connor, J., concurring).

clearly recognized. In the case at bar, Petitioner knew, approximately three months before the statute ran, that he had a mixed petition. JA 58, 60, 292.

CONCLUSION

Stay and abeyance is not an appropriate vehicle to be employed as a weapon against *Rose*, *Duncan* and the habeas statute of limitations. Respondent therefore requests that this Court affirm the holding of the Eighth Circuit prohibiting its use.

Respectfully submitted,

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